

1 mediation is the chosen method of ADR "no . . . judicial proceeding
2 shall be commenced until the mediation shall have been terminated
3 and at least 60 days shall have elapsed from the date of the
4 termination" (Mot. Dismiss, Ex. A at 18.)

5 The Court concludes that the above language controls the
6 timing of suits arising out of the policy and requires that the ADR
7 process take place before a lawsuit is initiated. Plaintiff makes
8 no argument that the ADR provision is unconscionable or otherwise
9 unenforceable as a matter of contract, and the provision does not
10 deprive Plaintiff of the right to bring a lawsuit if mediation
11 fails. There is therefore no reason not to hold Plaintiff to its
12 agreement.

13 Faced with a nearly identical ADR clause in a previous case,
14 this Court concluded that dismissal was appropriate by treating the
15 motion as a "'non-enumerated' Rule 12(b) motion[]" based on,
16 essentially, "failure to exhaust non judicial remedies." Previti
17 v. Nat'l Union Fire Ins. Co. of Pittsburgh PA, No. EDCV 12-00704
18 DDP, 2012 WL 3257877, at *3 n.5 (C.D. Cal. Aug. 7, 2012). However,
19 the case the Court relied on in Previti has since been overruled.
20 Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014) (overruling,
21 inter alia, Inlandboatmens Union of the Pac. v. Dutra Grp., 279
22 F.3d 1075, 1078 n. 2 (9th Cir.2002)). Albino appears to disfavor
23 "non-enumerated" Rule 12(b) motions altogether as "not contemplated
24 by" the Federal Rules, but in any event they are no longer a
25 feasible mechanism for dealing with exhaustion questions, including
26 failure to arbitrate or mediate. Id. at 1169.

27 The Albino court therefore laid out two alternative procedures
28 for dispensing with unexhausted claims. First, "where a failure to

1 exhaust is clear from the face of the complaint, a defendant may
2 successfully move to dismiss under Rule 12(b)(6) for failure to
3 state a claim." Id. Second, where the failure to exhaust non-
4 judicial remedies is not clear on the face of the complaint, the
5 opposing party may move for summary judgment. Id. "If a motion
6 for summary judgment is denied, disputed factual questions relevant
7 to exhaustion should be decided by the judge, in the same manner a
8 judge rather than a jury decides disputed factual questions
9 relevant to jurisdiction and venue." Id. at 1170-71. This should
10 all take place, "if feasible," at the start of litigation.

11 Here, the Court concludes that failure to exhaust is clear
12 from the face of the complaint. Plaintiff's complaint does not
13 include the full policy or the ADR clause. However, the complaint
14 fundamentally relies on the policy, and it may therefore be
15 incorporated into the complaint by reference. United States v.
16 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is
17 not attached to a complaint, it may be incorporated by reference
18 into a complaint if the plaintiff refers extensively to the
19 document or the document forms the basis of the plaintiff's
20 claim."). The complaint does not allege that Plaintiff abided by
21 the ADR clause in filing the action; nor, indeed, has Plaintiff
22 argued otherwise. That Plaintiff has not exhausted the non-
23 judicial remedies required by the contract is therefore apparent on
24 the face of the complaint.¹

25

26 ¹Plaintiff also provides no argument that it will suffer
27 prejudice if the action is dismissed rather than stayed, such as
28 the running of a statute of limitations. Thus, there is no
equitable or other concern on the table that would counsel against
dismissal.

1 The Court therefore DISMISSES the complaint WITHOUT PREJUDICE,
2 so that the parties may pursue alternative dispute resolution under
3 the terms of the policy.

4
5 IT IS SO ORDERED.

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8 Dated: July 17, 2015


DEAN D. PREGERSON
United States District Judge